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In the course of teaching jurisprudence each year, I try to get my students to see the problems posed for liberty and for legitimacy by the combination of legal ambiguity and legal finality. In particular, I ask them whether, especially in this post-Legal Realist age of non-interpretivism, they should not be afraid of a U.S. Supreme Court endowed with the power to write its own Constitution and call it the law of the land.

But, though we in America would have no legal recourse in the face of a tyrannical court, we could have a cumbersome political remedy, as the respected Indian scholar P.K. Tripathi has argued.[1] We could seek to re-amend the Constitution to eliminate truly outrageous judicial alterations.

Opposition to a supreme court would be more difficult in Nepal. The Nepalese Constitution of 1990 proclaims the invalidity of attempted constitutional amendments which violate "the spirit of the Preamble."[2] Since that Preamble, like most, is exceedingly vague and multi-faceted, a supreme court granted the power to

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[1]P.K. Tripathi, Rule of Law, Democracy, and the Frontiers of Judicial Activisms. 17:1 J Indian Law Inst. 17, 28 (1975). Prof. Tripathi's purpose was to use United States practice to critique the more unlimited form of judicial power then emerging in India.

[2]Constitution of the Kingdom of Nepal 2047, Art. 116(1) (1990) [hereinafter N.C. art ___]. The English translation used in this article is that authorized by His Majesty's Government, Ministry of Law, Justice & Parliamentary Affairs and published in March, 1992 by the Law Books Management Board, Babar Mahal, Kathmandu, Nepal. An earlier English translation may be more easily found in Nepal, XII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 15-218 (Albert P. Blaustein & Gisbert H. Flanz, eds., Dobbs Ferry, New York: zocean Publications, 1992). A chronology of events leading up to promulgation by Kunjar M. Sharma, Mark J. Plotkin, and Kenneth S. Gallant is also provided. Id. at 1-11.

enforce its "spirit" can legally put down any rebellion against judicial authority. There is thus no lawful way to bring a faithless court back under the law.

Nepal's is, of course, not the only constitution to limit the amending power. The U.S. Constitution contains at least[3] a minor limit, Article V's protection of each state's equal representation in the Senate. And, for example, France does not permit amendments affecting the "republican form of government,"[4] while Germany entrenches basic principles of federalism and human dignity.[5] By contrast, the Indian Supreme Court enjoys extraordinary freedom, for it has successfully claimed for itself the right to strike down amendments that violate the "basic structure" or "essential features" of the Constitution – without any real textual mandate or standard at all.[6] But Nepal is noteworthy both for the rich ambiguity of its textual standard, and for the explicit mandate to go beyond the letter of the Preamble to find and enforce its "spirit". Moreover, unlike France and Germany, but like India, Nepal has established a Supreme Court without a rival

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[3]It has been suggested that Article V's protection of equal state suffrage might be amendable after all. Douglas Linder, What in the Constitution cannot be Amended?, 23 ARIZONA LAW REVIEW 717, 722-727 (1981). On the other hand, it has also been argued that there exist other substantive limits on the power of amendment to the u.S. Constitution. Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 YALE LAW JOURNAL 1073, especially 1084-86 and accompanying notes (1991).

[4]Article 89, Constitution of France (1958)

[5]Article 79(3) of the Basic Law reads as follows:

> Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.

The new Federal Constitutional Court seemed to rest this perpetuity clause on "principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution..." *Southwest Case* 1 BVerfGE 14 (1951), quoting with approval the language of the Bavarian Constitutional Court. WALTER F. MURPHY AND JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW (New York: St. Martin's Press, 1977) 208, 209.

[6]*Kesavandanda v. State of Kerala*, A.I.R. 1973 S.C. 1461. See discussion *infra*, pages 177ff. The Indian claim, unlike the German text, has never been founded by a Court majority on the existence of binding pre-constitutional law. The Indian limitation is for this reason, too, more remarkable than the German. To find an essence in an act of will is more difficult than to find it in natural law.

in the Constitution. That court appears to be the sole and final interpreter both of statutes and of their constitutionality in all significant contexts.[7] Furthermore, it has unusually great power to control its own docket and even its own future composition, as explained below.

Why have Nepal's dominant political forces[8] agreed to such tremendous consolidation of judicial power?[9] In particular, why has the Left, which has at times sought to abolish the Nepalese monarchy newly legitimated in the Constitution, let the Supreme Court have the power to block future constitutional reform? This article explores three factors which must be considered in answering these questions: the contingencies of recent Nepalese political struggles, the influence of Indian constitutional theory, and the apparent lack of consideration of alternatives. In a final section, I shall suggest that the text of the Nepalese Constitution may still leave open the path to certain of these alternatives.

The Nature and Power of the Nepalese Supreme Court

Associate judges of the Supreme Court are appointed by the king, after having first been chosen by the five-person Judicial Council (Nepal Constitution [hereinafter N.C.] arts. 87(1), 93(1)).

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[7]This essay focuses on the Supreme Court's extraordinary power Nepalese democracy. The non-democratic institutions of the military and the monarchy are not subject to judicial review by the Court. N.C. arts. 86(1), 88(2)(a), 31, 35(6), 41(2). The most obviously important and non-reviewable power of the king is that of declaring a three-month state of emergency suspending certain fundamental rights. With the cooperation at least of the upper house of the legislature, the state of emergency may be extended to twelve months. N.C. art. 115.

[8]The words "dominant political forces" are used advisedly, for the Nepalese people as a whole participated neither in any constituent assembly nor in any ratification process. See discussion *infra*, note 83 and accompanying text. Indeed, the constitution was drafted and promulgated over the objections of numerous ethnic and communal groups. Michael Hutt, *Drafting the Nepal Constitution, 1990*, 31 ASIAN SURVEY 1020, 1028-37 (1991). N.C. art. 112(3) excludes from political life all parties formed "on the basis of religion, community, caste, tribe or region". In this it was following Indian precedent. Section 123(2) of the Indian Representation of Peoples Act, 1951, formally prohibits such appeals to standards of group loyalty.

[9]The phrase "consolidation of judicial power" is taken from activist law professor Upendra Baxi. Professor Baxi has celebrated the indian Supreme Court's "consolidation of supreme judicial power" through its "Basic Structure" doctrine in his COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES viii (Bombay: N.M. Tripathi, 1985).

The Chief Justice and the two seniormost judges on the present Supreme Court form a majority of the Judicial Council, giving the core of the court power over the court's future composition (N.C. art. 93(1).[10] The Chief Justice is selected by the more politically structured Constitutional Council,[11] but must first have been a member of the court for at least five years (N.C. arts. 87(1), 87(2)). All Supreme Court judges hold office until age sixty-five (N.C. art. 87(5)). Tenure as Chief Justice is seven years (Art. 87(1)).

All other courts "and judicial institutions,"[12] except the Military Court, are under the Supreme Court (N.C. art. 86(1)). "All shall abide" by decisions made in individual cases (N.C. art. 96(1)). Moreover, any "interpretation given to a law or any legal principle" established by the Supreme Court in the course of litigation is binding on the government and on "all offices and courts" (N.C. art. 96(2)). Thus the court has power to make law through precedent.

Article 88(1), the paragraph giving the Supreme Court the power to strike down legislation, deserves to be quoted in its entirety:

> Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other

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[10]The other two members of the judicial Council are the Minister of Justice and "one distinguished jurist to be nominated by His Majesty." N.C. art. 93(1). India appears more recently also to be headed toward Supreme Court control of its own membership. THE ECONOMIST, October 16, 1993, at 36.

[11]The Constitutional Council is composed of the following members: Prime Minister, Chief Justice, Speaker of the House of Representatives, Chairman of the National Assembly, Leader of the Opposition in the House of Representatives and (for appointment of the Chief Justice only) the Minister of Justice and "a Judge of the Supreme court." N.C. art. 117.

[12]An earlier English translation used the potentially broader language "and other institutions exercising judicial power." CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 2.

> ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either **ab initio** or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

Note that the Nepalese Court has here been given more than the duty of judicial review of legislation. The unlimited option of non-retroactivity can be read as an explicit permission to change the fundamental law of the land as of the date of its decision. Even more important may be the complete abrogation of all standing requirements except citizenship for a petition alleging the unconstitutionality of a law.[13] Any citizen may so petition, not only someone harmed under the law in question or some designated office holder or holders. Few issues are likely to escape the scrutiny of a court with such enormous eyes.

The Constitution (N.C. art. 88(2)) goes on to grant the court *carte blanche* remedial powers:

> The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute.

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[13]Bharat Raj Upreti, Reader in Law at Tribhuvan University in Kathmandu, author of a text (in Nepali) on constitutional law, and prominent Nepalese activist advocate, has pointed out that "[t]his provision has broken through the traditional approach of case or litigation based review and the classical requirement of locus standi." " An Insight into the Legal System of Nepal, "SAARC conference, fall 1991. SAARC, the South Asian Association for Regional Cooperation, includes Bangladesh, Bhutan , India, Maldives, Nepal, Pakistan, and Sri Lanka. Indian constitutional developments had, however, paved the way for this final step. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. OF COMPARATIVE L. 495, 498-99 (1989).

The above provisions concerning judicial appointments and tenure, *stare decisis*, judicial review of ordinary legislation, and remedies make Nepal's Supreme Court a formidable institution. The primary focus of this article is a further constitutional power that has been placed within the reach of this already very strong court. Article 116 is entitled "Amendment of the Constitution." Section (1) thereof declares

> A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament:
>
> Provided that this Article shall not be subject to amendment.

The remainder of Article 116 spells out the procedural requirements for amendment. Two-thirds of the legislature must be present, and two-thirds of those present must approve, in order for amendments to be made to the Constitution. The king may delay but not prevent amendments. The relative procedural ease with which constitutional amendments may be passed (the attainable majority, and the lack of any requirements for referenda, local ratification, multiple readings and the like) would seem further to enhance the importance of the interpreter of the "spirit of the Preamble." If many amendments are attempted, that interpreter can sift among them to shape the Constitution to its liking.

Who is that interpreter? Although there has been no definitive ruling on this matter, by the Supreme Court or by anyone else, all Nepalese legal professionals whose opinion I have canvassed assume without a doubt that it will be that court. Therefore, I shall assume the same in the following pages, and explore the consequences of this extraordinary consolidation of judicial power. However, it will later be my contention that Article 116(1) need not be read to confer amendment-review power upon the court. I shall seek to demonstrate my view in the last section of this article.

The Preamble itself[14] is a decent and even stirring aspirational document, entirely suited to its function of introducing a new democratic legal order. But the text provides no real guidance for constitutional limitation. Its aims are vague (e.g. "social, political and economic justice," "basic human rights," "fraternity," "equality," "the Rule of Law") and potentially in conflict.

We may observe that the Preamble incorporates in its heart perhaps the greatest antinomy of modern law, the tension between formal legal justice and substantive social and economic justice. Should the law aim at rule compliance or at results ? More concretely, should it strive for equality in form or in substance ? This last dilemma has torn apart Indian constitutional theory for the last forty years, as we shall see below. Does equality mean that large landholders must be treated the same or differently from other property owners ? Are affirmative action quotas required or forbidden ?

I submit that no one person or institution can answer these questions fairly. The genius of democratic theory has been to divide the task, with the legislature authorized to enact laws aimed at substance, which laws are then enforced formally by the courts[15]. So, for example, in the body of Nepal's Constitution, social transformation goals are called "Directive Principles and Policies"

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[14]"WHEREAS, We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people, and, therefore, We have from time to time, made known our desire to conduct the government of the country in consonance with the popular will :

AND WHEREAS, in keeping with the desire of the Nepalese people expressed through the recent people's movement to bring about constitutional changes, We are further inspired by the objective of securing to the Nepalese people social, political and economic justice long into the future ;

AND WHEREAS, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal ; and also to consolidate Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality ; and also to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality ;

NOW, THEREFORE, keeping in view the desire of the people that the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in according with the provisions of this Constitution, I, KING BIRENDRA BIR BIKRAM SHAH DEVA, by virtue of the State authority as exercised by US, do hereby promulgate and enforce this CONSTITUTION OF THE KINGDOM OF NEPAL on the recommendation and advice, and with the consent of the Council of Ministers.

[15]As a socialist who is also a democrat, I support this division.

(N.C. part 4, arts. 24-26) and made fundamental for legislation. But, unlike the rest of the Constitution, they are not to be enforceable in any court [N.C. art. 24 (1)]. The Preamble, of course, necessarily and properly incorporates basic aspects of these Directive Principles and Policies, so that an amendment-supervising court ends up required to enforce them after all, along with the formal tasks more common to courts.

Even where the Preamble is most concrete it can provide little guidance to the court, because its "spirit" is what must be enforced. The spirit could easily be said to contradict the mere letter of the Preamble.[16] Can "Multi Party Democracy" be abolished in favour of single-party rule, even though the former is listed as a specific goal in the Preamble ? Perhaps so, for a single party could be said to further the objective of "fraternity." (Indeed, the only time the English word "spirit" is actually used in the official Preamble translation is in the phrase "spirit of fraternity.")

Why did the farmers of the Nepalese Constitution decide to give such counter-majoritarian power and discretion to their new Supreme Court ? The short answer, the merely political answer, will be explored first. It is not difficult to see how the present Article 116 emerged as a compromise in a moment of great political pressure. But why did this solution occur to the framers ? The answer here takes us deep into Indian constitutional history, on which Nepalese legal culture, and particularly the new democratic regime, is based. There we shall see how such consolidated judicial power came to be regarded as legitimate and preferable. We shall also take note of the relative absence of Indian thought concerning institutional alternatives.

Court Power as the Consequence of a "Constitution of Suspicion"

An observer at the meetings in which the final version of the constitutional text was drafted, has stated that "ours is a constitution of suspicion."[17] Mistrust among the three most

[16]For example, former Indian Prime Minister Indira Gandhi urged, on the occasion of the 25th Anniversary of the (Indian) Constitution, that "[form and letter must sometimes change in order to preserve the spirit." *Consolidating National Gains : Speeches of Shrimati Indira Gandhi* 258 (1976), quoted in D.C. Jain, *The Forty-second Amendment : An Evaluation*, INDIAN CONSTITUTION : TRENDS AND ISSUES 56 (Rajeev Dhavan & Alice Jacob eds., copyright Indian Law Institute ; Bombay : N.M. Tripathi, 1978).

[17]Through the maker of this comment prefers not to be quoted by name, conversations with Bharat Raj Upreti, *supra* note 13, and with the respected monarchist Ganesh Raj Sharma, 27 January 1993, confirmed this view.

powerful actors in the constituent process—the king, the Nepal Congress Party (Congress), and the United Left Front (ULF)—led them to turn to the Supreme Court as their "savior."[18] Because they could not trust each other, they decided to trust the court.

That suspicion appears to have reasonable grounds. King Mahendra, the father of the current monarch, King Birendra, used his emergency powers to abolish the democratic Constitution of 1959 only a year and a half after it had gone into effect .[19] The ULF was composed of various Communist factions, and therefore suffered from the anti-democratic behaviour of sister parties that had installed one-party rule in other nations. The center-left Congress Party was not credible to either extreme, and must also have borne some onus as a result of the years of self-serving actions of its Indian namesake.

Moreover, one must bear in mind the astonishing rapidity with which the Constitution of 1990 was drafted and promulgated. The Congress Party and the ULF launched the "Movement for the Restoration of Democracy" on 18 February 1990.[20] After some violence, an interim government led by the Congress Party, with ULF participation, was appointed by the king. In late May, after further struggle, the nine person Constitutional Recommendation Commission, headed by the Supreme Court's Justice Upadhyaya, began its deliberations. On 31 August the initial draft was completed.

According to press reports, Congress Party members had wanted three basic features of the new constitution to be non-amendable : constitutional monarchy, multiparty democracy, and the sovereignty of the people. But at the last moment the ULF refused to support the first two. Justice Upadhyaya succeeded in bringing about a compromise in which the "basic structure" of the Constitution would be subject to amendment, but only under the heightened requirements of a three-fourths legislative majority plus a national referendum. Since it would have been up to the future Supreme Court to identify the contents of the "basic structure," it would seem that the transfer of control over amendments to the court began at this point, through the popular perception continued

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[18] *Id.*

[19] RISHIKESH SHAHA, POLITICS IN NEPAL 1980-1990 : REFERENDUM, STALEMATE, AND PEOPLE POWER 8 (New Delhi : Manohar Publications, 1990).

[20] Except as otherwise indicated, the source of the data on the drafting process in Hutt, *supra* note 8. *See also* the brief chronology by Gallant, *supra* note 2.

to be that it was constitutional monarchy and multiparty democracy which were subject to special protections from amendment.[21]

The Council of Ministers of the interim government then had a chance to make revisions, which it did. Sensing an important victory in the principle of universal amendability, despite the special hurdles to be overcome, the Left fought vigorously to retain the compromise just discussed. Both the king and Congress people were alarmed, however. No one knew what results the first election might bring and how easy a three-fourths majority might be to obtain -- an argument which also had some force with those on the Left who feared the potentially conservative tendencies of the masses.[22] In the end, with the reluctant acquiescence of the ULF, the Council of Ministers adopted the present "spirit of the Preamble" wording of Article 116 in its final draft. The real victor here was the Nepal Congress Party, for the king later made an unsuccessful attempt to revert to a specific list of entrenched protections,[23] and Left leaders later regretted their compromise (especially after doing quite well in the initial elections).[24] On 9 November 1990, King Birendra promulgated the Constitution without further change in its amendatory provisions.

There was some worry among the framers that too much power was being entrusted to the new Supreme Court. But it was thought that some one institution had to have final power to decide legal issues, and people trusted the court more than they trusted other institutions, and certainly more than they trusted one another. There seemed no way to give someone else the ability to limit the court without making matters worse.[25]

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[21]Hutt, *supra*. at 1032, implies that specific amendatory limitations were still in the draft constitution at this stage, but the English-language copy in my possession has only the words "basic structure".

[22]Interview with Tirtha Man Sakya, Joint Secretary, MINistry of Law and justice, 2 September 1991.

[23]Conversation with Bharat Raj Upret, *supra* note 13, 25 January 1992.

[24]Interview with Tirtha Man Sakya, *supra* note 22.

[25]See note 17 *supra*.

India's Acceptance of Consolidated Judicial Power

The concept of "basic structure" was the immediate step between a textually limited court and the present court guided only by a "spirit." That intermediate concept came directly from Indian constitutional law, where it had been closely associated with the Indian Preamble. In order to understand the availability and attractiveness of the route taken by the Nepalese drafting process, we must, therefore, turn to India.[26] Despite their complexity, we cannot avoid summarizing some of the salient features of post-independence legal developments in that nation, for India's prior consolidation of judicial power in a single Supreme Court made itself strongly felt in Nepal.

Like that of Nepal, the Constitution of India [hereinafter I.C.] contains a set of Fundamental Rights (I.C. arts. 12-35), to be enforced by the Supreme Court against statutes (I.C. arts. 13(2), 32(1)). Virtually all these rights are classic negative defense rights of the individual against the State, rather than entitlements to positive assistance by the State. In other words, they require State inaction rather than State action. India also has a list of "Directive Principles of State Policy" that spells out affirmative actions the State must undertake to achieve social and economic goals (I.C. arts. 36-51), but these are declared not enforceable by any court (I.C. art. 37).

The first twenty years of the independent Indian polity saw a seesaw struggle between court and Parliament as each sought to comply with its constitutional mandate. The legislature would enact laws (e.g. land reform) interfering with the right to property (then guaranteed by I.C. art. 31) or interfering with the right to equal protection and equality before the law (I.C. art. 14), in order to further some social welfare purpose found in the Directive Principles. The court would often counter by declaring the law void for violating Fundamental Rights. Parliament would then use the amendment procedure found in I.C. art. 368 (requiring only a

[26] India's strong influence on Nepalese law is discussed further below, in note 63 and accompanying text.

two-thirds Parliamentary majority for amendments relevant to fundamental rights and to most other parts of the Constitution) to validate its legislation after all.

Article 31B, inserted in 1951 by the First Amendment to the Indian Constitution, gives a marvelous sense of the depth and tragedy of this conflict. That article simply creates a list of state and national laws, the Ninth Schedule, that are declared not to be void by reason of infringement of any of the Fundamental Rights. The list has been added to from time to time by two-thirds majorities in Parliament, while the state or national legislature originally passing each law is free to repeal it. In other words, in adding to the Ninth Schedule, Parliament not only abridges the Fundamental Rights; it does so without even attempting to articulate new and generalizable legal principles. A law on the list is valid. Another similar or even identical law not on the list may be declared void.

Parliament may well have felt it was acting quite appropriately. No planner, public or private, no one who cares about results can operate efficiently if he or she must constantly reformulate every contingent and instrumental command as a universal formal rule. And no decent planner would want to modify or give up his or her ideals every time they were abridged in practice.

Yet from a formal, legal point of view, more than specific individual rights were at stake. By its unprincipled use of amendments, Parliament was sacrificing the very of idea of a constitution, even a changeable one. Still, the Supreme Court upheld Article 31B, and forebore from challenging Parliament's nearly plenary amendment powers until 1967.

In that year the court finally made a stand. In *Golak Nath*,[27] by a bare majority, it stated in dictum, prospectively only, that from then on no amendment would be held constitutional which violated the Fundamental Rights. Its basic argument was simple. Article 13(2) states that any "law" taking away or abridging those rights is void. But a constitutional amendment is

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[27] *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

a kind of "law." Therefore, amendments abridging the Fundamental Rights are likewise void.

Negative political reaction to *Golak Nath* was overwhelming among Indian opinion leaders, particularly those of the Left. Judicial review seemed to be a device for the protection of the rich minority against the poor majority, which in India is quite a majority indeed. Indira Ghandi swept back to victory in 1971, based in part on an anti-court campaign, and passed two key constitutional amendments designed to counter *Golak Nath*. The Twenty-Fourth amended Articles 13 and 368 to make clear the former did not apply to the latter, and that the amending power itself was plenary. The Twenty-fifth inserted Article 31C into the Constitution, providing that no law effectuating a policy aiming to secure the Directive Principles found in Article 39(a) and (c), dealing with property redistribution, was to be held invalid for infringing equality (I.C. art. 14), basic freedoms (I.C. art. 19) or the right to property (then found in I.C. art. 31). The Twenty-Fifth Amendment also strengthened the non-justiciability of the Directive Principles, by stating that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

In the great *Kesavananda* case[28] of 1973, the Supreme Court made a strategic retreat, only to advance much further. It declared the *Golak Nath* doctrine to be mistaken, on the ground that a constitutional amendment is really not a law in the ordinary sense. And it upheld the two amendments mentioned above, except for the last section covering legislative declarations of intent, as well as some new additions to the Ninth Schedule.

At the same time, again by a single vote, the court announced a new limitation on constitutional amendments. They

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[28] *Supra* note 6. A detailed analysis and careful critique of the case may be found in David Gwynn Morgan, *The Indian 'Essential Features' Case*, 30 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 307 (1981). Cf. Nani A. Palkhivala, OUR CONSTITUTION DEFACED AND DEFIED (London: MacMillan 1974).

may not abrogate the "basic structure" or "essential features"[29] of the Constitution. Though there were varying concurring opinions rendered on the point, the net argument of the court seems to be that the framers of the Indian Constitution could not have intended the word "amendment" in Article 368 to include changes so drastic as to alter the very identity of the Constitution.[30]

The court was not in agreement on the content of the basic features. Some judges focused upon the Preamble,[31] which is short enough to quote here:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR[32] DEMOCRATIC REPUBLIC and to secure to all its citizens:
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> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity[33] of the Nation;

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[29]The expressions "basic features", "basic elements", "basic framework", "basic features", "fundamental features", "essential features", and other like variations to be used interchangeably by the majority in *Kesavananda*, *supra* note 6.

[30] The arguments in support of this proposition are based in political theory as well as in textual analysis. It is said, for example, that the sovereign people would not have wished to delegate to Parliament the power to destroy the basic elements of the new constitution. See Shelat and Grover, JJ., *id.* at 1603 and Hegde and Mukherjea, JJ., *id.* at 1624-25.

[31]E.g., Sikri, C.J., *id.* at 1534-35, and Shelat and Grover, JJ. *id. at 1603.*

[32]The words "SOCIALIST SECULAR" were added in 1976 by the Forty-Second Amendment.

[33]The words "and integrity" were also added in 1976 by the Forty-Second Amendment.

> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Seven out of the thirteen justices stated in dictum, however, that the right to property did *not* impose any limit on constitutional amendments. This majority included those who favored no basic structure limit at all, plus one of those who had voted to impose such a limit but who explicitly excluded the right to property from the unalterable basic structure.[34]

While the justices stated that from then on all additions to the Ninth Schedule would be examined for conformity to the basic structure, the only law actually struck down in *Kesavananda* was, as stated above, the "declaration" clause attached to the new Article 31C,[35] thereby permitting the court to inspect Article 31C laws to make sure that they "give effect" to the appropriate policies.

Though the Indian court gave up its *Golak Nath* role of absolute defender of the Fundamental Rights, it took upon itself perhaps an even more difficult task. For the Constitution as a whole, especially the Preamble, contains much language supporting affirmative as well as negative rights. That is, with regard to future amendments, the court took upon itself the role of guardian of the essentials of both the Fundamental Rights and the originally non-enforceable objectives found in the Directive Principles of State Policy. And, as its approval of Article 31C makes clear, the court's role in supervising statutory law would also henceforth be enhanced, for it would be involved in judging various laws' contingent and instrumental effectiveness in furthering social goals. In such *ad hoc* judging of the usefulness of particular abridgments of fundamental rights, the court, I submit, cannot but make the same kind of contingent and changing guesses that any legislature

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[34]Khanna, J., cast the important swing vote on this point. *Kesavananda*, *supra* note 6, at 1881.

[35]Again, the vote of Khanna, J. was decisive. *Id.* at 1880.

must make.[36] Scholars both critical and supportive of *Kesavananda* have judged the curt thenceforth to be a "constituent assembly in perpetual session," corresponding to Parliament in the United Kingdom."[37]

In other words, according to the court, the essence of the Indian Constitution is contingent. What it requires and forbids depends in part upon judgments of effectiveness in achieving the social policy goals delineated by the Directive Principles. This result-oriented changeability alone might not serve to distinguish "basic structure" from many other highly indefinite legal concepts. But here the Indian Supreme Court has, at the same time, held that the framers intended this essence to be unchangeable, so that all amendments which seek to alter it must be struck down. This is surely a near antinomy, this idea of unchangeable changing essence, this strange juxtaposition of Platonism and instrumentalism.

Here is another puzzle. *Kesavananda* was at least as anti-majoritarian as *Golak Nath*. It gave the court more power and much more discretion, for the undefined "basic structure" might include selections from any part of the Constitution. The search for the essence of the Constitution was described recently by the Attorney General of India as "a blind man in a dark room searching for a black cat which is not there."[38] Yet Kesavananda is today widely accepted while its predecessor was not. Why? Beyond the vast details of history, I think at least two reasons can be discerned.

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[36] There can, of course, be disagreement as to how effective the legislation must be in order to be constitutional. That, it seems to me, is the crux of the debate between Chandrachud, C.J., and Bhagwati, J., in *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1787. The former (for the majority) claims, at 1810, that only a "direct and reasonable nexus" is required between the law in questions and the relevant objectives specified in the Directive Principles. The latter argues, at 1856, that each provision of the law must be "basically and essentially necessary for giving effect to the Directive Principle." Both standards, however, must involve contingent estimates of the usefulness of the law in achieving the objective.

[37] Tripathi, *supra* note 1, at 34. Baxi, *supra* note 9, at 69, rejoices in the Court's "concurrent constituent power".

[38] G. Ramaswamy, HINDUSTANI TIMES 10 October 1991.

First of all, the court moved left. It jettisoned the right to property and took upon itself the task of safeguarding the social welfare policies of the State. The new self-image of many of the court's leading members can perhaps best be felt in the following description by Justice (as he then was) P. N. Bhagwati:

> [The] independence of the judiciary...is a basic feature of the Constitution.... It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter.... The judiciary has therefore a socio-economic destination and a creative function. It has...to become an arm of the socio-economic revolution and perform an active role.... It cannot remain content to act merely as an umpire.... [T]his approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice.... [The judiciary] must become an active participant...through a pro-active goal oriented approach. But this cannot happen unless we have judicial cadres who share the fighting faith of the Constitution.[39]

Bhagwati goes on to insist, quoting Justice Iyer, that a "social philosophy in active unison with the socialistic Articles of the Constitution"[40] is indispensable for the appointment of a judge. His colleague Justice Desai adds in the same case that "[a]n activist role...is a sine qua non for the judiciary. If value packing [of the courts] connotes appointment of [such] persons otherwise well qualified...then not only the value packing is not to be frowned upon...but it must be advocated with a crusader's zeal."[41]

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[39] Gupta v. Union of India, A.I.R. 1982 S.C. 149, 197.

[40] Id.

[41] Id. at 446.

In 1985, during his tenure as Chief Justice, Bhagwati commented that judges need not "feel shy or apologetic" about their "law creating roles":

> The Supreme Court of India has been performing this role in the last 7 or 8 years by wielding judicial power in a manner unprecedented in its history of over 30 years.... The courts of India...started the legal aid movement...fostered the development of social-action groups...developed the strategy of public interest litigation.... In the process [the court] has rewritten some parts of the constitution...contrary to the intent of the makers of the constitution.[42]

H. M. Seervai, a leading constitutional theorist of India, has objected that the Directive Principles of State Policy are simply not intended to be enforced by the courts, either directly or indirectly by insisting on "effective" amendments or legislation.[43]

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[42] 17(1) GARGOYLE 6, 7-8 (School of Law, University of Wisconsin at Madison, Summer, 1986). (That "intent of the makers" was not ancient. The Constitution had gone into effect only in 1950.) Jamie Cassels, writing in 1989, agreed with Chief Justice Bhagwati: "Painfully aware of the limitations of legalism, the judiciary of India has struggled over the last decade to bring law into the service of the poor and oppressed." Cassels, supra note 13 at 497. "The new judicial activism may...be understood as part of...a strategic reversal of previous judicial priorities in order to win popular support and achieve a more prominent role in Indian society." Id. at 510-11. Rajeev Dhavan has commented

> "[s]purred on by an inchoate alliance of social activists, lawyers, journalists and academics, some judges of the Supreme Court sought to rethink the fundamental concerns of the Constitution....The result of these efforts has been referred to as India's 'Public Interest Law Movement.' Although these initiatives have been connected with varieties of social activism, the movement as a whole has been a middle class affair....The Supreme Court entered into a partnership with the new self-declared 'trustees' of socialism."

The Constitution as the Situs of Struggle: India's Constitution Forty Years On, CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 373, 383 (Laurence W. Beer, ed., Seattle: University of Washington Press, 1992). See also *id.* 416-17.

[43] See his CONSTITUTIONAL LAW OF INDIA 1600ff (3rd edition; Bombay: N.M. Tripathi Private Ltd., 1984). Binod K. Agrawala has opposed the judicial practice of reading the non-enforceable Directive Principles into the enforceable Constitution, arguing that to do so is to alter the basic structure of the Constitution. The Legal Philosophy of P.N. Bhagwati, 14 INDIAN BAR REVIEW 136, 142-43 (1987).

Nevertheless, the court seems committed to the notion that the Directive Principles are as much a part of the basic structure as are the Fundamental Rights, and that that structure will be used as a standard in striking down unconstitutional amendments. With regard to statutes, Justice Bhagwati has argued in dissent that, under a later addition to Article 31C,[44] any laws with a "real and substantial connection" to a Directive Principle must be valid, regardless of the effect on Fundamental Rights.[45] In a later case, Bhagwati was able to join the main opinion of a five-judge bench in holding to the trumping power of properly effecting state directive policies, even against rights to equality and basic freedoms, and in declaring prior limiting language to be mere dictum.[46] As has been pointed out by a leading commentator,[47] this position may appear at first glance judicially modest, in that it cuts back on fundamental rights as a standard for review, but it actually widens the scope of review to include the contingent causal nexus between law and results.

The Supreme Court's new and active stance has been welcomed by leading academics and other emergent elites.[48] One important writer-activist has expressed his delight at the special access that social action litigators now have to a court which is

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[44] In 1976, the Forty-Second Amendment made laws giving effect to "all or any" of the Directive Principles the power to override the Fundamental Rights found in articles 14 and 19.

[45] *Minerva Mills*, *supra* note 35, at 1855. Both majority and dissent agree, however, that the Directive Principles form part of the basic structure of the Constitution.

[46] *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, A.I.R. 1983 S.C. 239, thus appears to have negated the majority opinion found in *Minerva Mills* on this issue.

[47] S.P. Sathe, CONSTITUTIONAL AMENDMENTS 1950-1988 79 (Bombay: N.M. Tripathi Limited, 1989).

[48] Sathe claims that, whereas there had been a "consensus among the intelligentsia" against *Golak Nath* for upholding the status quo, *id.* at 71, "there is now an agreement generally among all political parties, intelligentsia, the legal profession as well as the Press [sic] that the power to amend the Constitution must be subject to restrictions," *id.* at 91.

certainly not "independent" in the old legalistic sense.[49] Indeed, many support the court's imposition of "basic structure" precisely because it has no structure. Important Indian scholars have opposed any precise enumeration by the court of the elements of the basic structure concept. Dr. Virendra Kumar has agreed that the court must preserve the "total identity" of the Constitution by striking down amendments, but has argued that the court must not explain specifically what its standard is, for that would make the Constitution "static."[50] Professor C. G. Raghavan also wants the "unique identity" of the Constitution to be preserved, but not by having its nature spelled out, for "an abstract and doctrinaire approach to the construction of the basic structure limitation has to be avoided since judicial functionalism and pragmatism are the desideratum...."[51] Professor S. P. Sathe, similarly, supports the

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[49] Baxi, *supra* note 9 at 23ff. This U.S.-educated scholar has been quite influential in introducing sociological realism and judicial interventionism into Indian jurisprudence. Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. OF COMPARATIVE L. 505, 517-18 (1985). Professor Baxi's wholehearted rejection of formalism and embrace of activism take on special social and political significance in the light of his later appointment as Delhi University's Vice Chancellor.

Baxi's COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES *supra* note 10, at 110, ends, significantly, with an appeal to Friedrich Nietzsche and an exaltation of "the judicial will to power." The book also begins by quoting Nietzsche's aphorism that "courage slayeth also fellow suffering." *Id.* at vii. Baxi deduces that the Indian Supreme Court's courage will help end the suffering of the masses.

Does it matter that Nietzsche's kind of courage was meant to end pity rather than to end suffering? Baxi appears to have been misled by the words "fellow suffering," which are an odd translation of the German *Mitleiden*. A better rendering would be "pity" or "compassion." One of the major themes of the work Baxi quotes is the need of the will to power to free itself from pity for others. Compare *Thus Spake Zarathustra* (Thomas Common trans.) in THE PHILOSOPHY OF NIETZSCHE 172, 368 (New York: Random House-Modern Library, 1954) with ALSO SPRACH ZARATHUSTRA 120, 252 (Munchen: Wilhelm Goldmann Verlag–Goldmanns Geibe Taschenbucher, undated).

My point is not that Professor Baxi praised Nietzsche unthinkingly but that he praised the "will to power" unthinkingly. Or perhaps not so unthinkingly. Baxi recently felt sufficiently powerful to reprimand the Court for evincing the wrong kind of pity. When Chief Justice Ranganath Misra dared to criticize the activist lawyers involved in the Bhopal tragedy for "misleading victims," Baxi reportedly responded by denouncing such "judicial absolutism" and suggesting that the bar demand that the Chief Justice's remarks be expunged from the judgment. "Judicial accountability panel plea" THE TIMES OF INDIA, October 7, 1991, p. 4.

[50] Quoted with approval by Sathe, *supra* note 47 at 92-93.

[51] *Id.* at 93.

high court judges' careful use of the doctrine of constitutional essence, but points out that "[n]ow that they are the determiners of such a highly political and policy question such as what is basic structure, they have to admit that their function cannot be merely of the interpretation of the Constitution."[52]

To recapitulate: The basic structure doctrine is built upon the premise that there is an unchangeable nature of the Constitution. But that structure was denatured by the incorporation of contingent instrumental policies. The resulting antinomy, however, became widely accepted by modernizing opinion leaders precisely because of this internal contradiction. What better political weapon could there be than a nominal essence, a temporary eternal truth?

Still, we may well ask why such a weapon is needed to further the social welfare policies found in the Directive Principles. Since those policies are directed, by and large, toward securing the interests of the poor, who form the vast majority of Indians, why keep the basic structure limit at all? Why not just let Indian democracy, via a near-plenary amendment power, have its way?

The answer most often found heard in India is that Indira Gandhi's seizure and misuse of quasi-dictatorial emergency powers during the 1970's showed that in India even the majority needs the court to defend it. But, as David Gwynn Morgan has well observed, the Indian electorate was sufficiently alert to eject Mrs. Gandhi from office twenty months after she had assumed those powers.[53] The problem for the leading Indian elites may be that the electorate rejected Mrs. Gandhi for the wrong reasons – not because she had imposed press censorship and even imprisonment on opposition leaders, but because she had sought to impose family planning and sterilization upon the masses.[54]

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[52] *Id.*

[53] Morgan, *supra* note 28 at 335.

[54] So argued Professor Solil Paul of the Law Department at Delhi University, December, 1991.

As the court had moved left, the electorate had moved right. This is a second reason for the acceptance by Indian academic elites of the *Kesavananda* doctrine. Indira Gandhi was feared not so much because she opposed the interests of the poor as because, for many months, she had their support. Justice Subba Rao had long ago proclaimed it the "duty of the court to protect people's rights against themselves,"[55] and this became much more important once it became clear that Indira Gandhi was not a true leftist[56] and that there had been a "socialism holiday" in her legislation since 1969.[57] Professor Sathe has been most forthright in this regard, lamenting (without apparent irony) that in India the "ignorant masses can be managed, elections can be won, and majorities can rule without any regard for public opinion."[58] And what is this non-majoritarian "public opinion" which must be consulted? Professor Sathe elsewhere explains that "the Press, the Judiciary, and the Intelligentsia have to act as restraining forces on democracy."[59] "[C]harisma, religion, and other populistic devices can be used for winning elections,"[60] and in such a situation, "the Judiciary's role is bound to be much more crucial."[61] Despite the presence of a few distinguished more conservative constitutional scholars, such as H. M. Seervai and D. D. Basu, my own inquiries convince me that the Indian academic response to the basic structure limitation resembles overwhelmingly that of Professor Sathe and the others quoted above.

Such widespread Indian acceptance of the basic structure doctrine, both as a useful socialist tool and as a necessary

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[55] Quoted by Sathe, *supra* note 45, at 96.

[56] Sathe, *id.* at 24.

[57] *Id.* at 49.

[58] *Id.* at 95.

[59] *Id.* at 74.

[60] *Id.* at 74.

[61] *Id.* at 96.

protection from the masses, could not but strongly influence the many Nepalese students studying at Indian law schools. Until quite recently, virtually all of Nepal's lawyers were trained in India.[62] Even today, Nepal is only just beginning to implement its own LL.M. program, so that postgraduate studies must still be done in India.[63] It is easy to see how the Nepalese Left, in particular, would not find the basic structure doctrine entirely uncongenial, despite its potential for use by conservatives. It would be even more acceptable if a formula such as "spirit of the Preamble" were adopted -- for then the new Supreme Court would have as its clear mandate the furtherance of Directive Principles and Policies as well as Fundamental Rights. The records of the 1990 "Consultations in Constitutionalism" organized by two leading activist Nepalese lawyers' groups, Forum for Protection of Human Rights (FOPHUR) and the Legal Research and Development Forum (FREEDEAL), show that the only Indian jurist attending was former Chief Justice of the Indian Supreme Court P. N. Bhagwait, whose strong support for a socialist construction of basic structure has been cited above.

The Absence of Alternatives to Consolidated Judicial Power in Indo-Nepalese Legal Culture

Acceptance of the idea that there is a basic structure of the Constitution that may not be changed, and that this basic structure includes both individual rights and state welfare goals, need not in itself have led to the centralized supreme judicial power now found in India and Nepal. For the question still remains open: What institution or institutions shall decide whether the basic structure has been violated?

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[62]Conversations with and Bharat Raj Upreti and others, 25 January 1992. See *supra* notes 13 and 17. The chronology cited above indicates that from "the time of Buddha..., Indian juridical and political conceptions have had an important influence [on Nepal]." Sharma and Plotkin, *supra* note 2 at 1.

[63]Interview with Bharat Bahadeer Karki, then dean of the Central Law Department, Tribhuvan University, August 1993. I had a number of Nepalese students, including Bharat Raj Upreti, when I was teaching in the LL.M. program at Poona University in India in 1980-81.

There is no text in the Indian Constitution that explicitly gives the Supreme Court this power. Indeed, there is no text which explicitly empowers the court to do more than to enforce the Fundamental Rights, even against ordinary legislation.[64] The Constitution need not have been read to grant the court the right to use infringement of the rest of the Constitution as a reason to declare a statute *ultra vires*. In other words, the court need not have been thought to be the sole final interpreter of the entire Constitution. Yet Indian lawyers and law professors almost universally[65] assume that the Supreme Court must in the end decide all constitutional questions, or, on a more abstract level, that all important questions of law must in the end be resolved by a single supreme legal tribunal. Even Indira Gandhi at the height of her power does not seem significantly to have questioned the idea that the court is the final arbiter of the meaning of the Constitution, for she always responded to its decisions by constitutional amendments rather than by simple denials of the court's authority.

Nevertheless, there exist two clear alternatives to consolidated judicial power, over statutes or over constitutional amendments, the first of which can be called "checks and balances," and the second "separation of powers."[66] The first

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[64]Article 13 voids only laws "inconsistent with or in derogation of the fundamental rights." Article 32 confers upon the Supreme Court only those powers necessary "for the enforcement of the rights conferred by this Part," i.e., by Part III, "Fundamental Rights." Article 141 makes the Supreme Court's determinations of law binding on all other courts, but does not extend the scope of judicial review. Article 144 requires all authorities to act in aid of the Supreme Court. By contrast, the High Court of a State may issue writs to enforce Part III rights or "for any other purpose," according to Article 226. Article 245 makes all legislation subject to the provisions of the Constitution, but does not specify an enforcement mechanism.

[65]DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW (New Delhi: Prentice-Hall, 1984) might have been expected to explore other possibilities, but it contains only brief and dismissive discussions, e.g., at 273-283, 465-481. The anti-judicial review opinions which he cites are all non-Indian. Although Basu says that there are Indian "non-believers" in judicial review, at 468, he does not mention any names. (Of course, the Indian Directive Principles were intended to be enforced entirely by the legislature, so in this sense the omission of judicial review can be said to have Indian roots.)

[66]These are terms taken from commom American usage.. Christopher Wolfe, in his THE RISE OF MODERN JUDICIAL REVIEW (New York: Basic Books, 1986) at 90-97, refers to "coordinate review" and "legislative supremacy," as two different alternatives to judicial review, with meanings similar to "checks and balances" and "separation of powers" respectively.

approach has received relatively more attention in U.S. thought and has been much more important in U.S. history. Since *Marbury v. Madison*,[67] there has been little objection to the Supreme Court's refusal to enforce legislation it deems unconstitutional. But there has been, and continues to be, support for the parallel argument that other branches of government should refuse to cooperate with actions of the court that those branches in turn deem unconstitutional. Thomas Jefferson is often quoted here saying that "nothing in the Constitution has given [the judges] a right to decide for the Executive, more than for the Executive to decide for them.... That instrument meant that its coordinate branches should be checks on each other."[68] Perhaps even more well known is Abraham Lincoln's refusal to acknowledge the *Dred Scott* decision's pro-slavery interpretation of the U.S. Constitution to be binding upon the rest of the federal government.[69]

This "checks and balances" approach has, in my opinion, the virtue and vice of preferring law over order. Each branch of government seeks to adhere to the law itself, in this case the Constitution, rather than to any fallible interpreter of it. Judicial, or any other, tyranny thus becomes less likely in the measure that anarchy, or at least inefficiency, becomes more likely.

Fidelity to law may, however, be infectious. It is hard to see why only governmental authorities should be faithful to the Constitution rather than to its interpreters. As Sanford Levinson has recently argued, the logic of Jefferson's and Lincoln's resistance to dictatorship ought to apply to every citizen.[70]

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[67]1 Cranch (5 U.S.) 137 (1803).

[68]As found in *PAUL BREST AND SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1010* (2nd ed.; Boston: Little, Brown and Company, 1983).

[69]*Id.* at 1011. One highly interesting mechanism for checking judicial review is Canada's creative experiment with limited legislative review of Supreme Court decisions holding statutes unconstitutional. Canadian Charter of Rights and Freedoms (Constitution Act, 1982) art. 33.

[70]Citing the work of Ronald Dworkin, Levinson concludes (in a section entitled Toward Individual Authority to Interpret the Constitution) that "'citizen review' is a vital necessity of any polity that purports to call itself constitutional." CONSTITUTIONAL FAITH 42, 46, 50 (Princeton: Princeton University Press, 1988).

Suppose all three branches of government conspire to subvert the Constitution. Should not every citizen resist? Surprisingly, there is a major national constitution that seems clearly to answer "yes," the Basic Law of the Federal Republic of Germany. Article 20(4) of that constitution proclaims "All Germans shall have the right to resist any person or persons seeking to abolish the constitutional order, should no other remedy be possible."

Perhaps Article 13 of the Indian Constitution could be used in a similar way by the defenders of Fundamental Rights, in order to resist the Indian Supreme Court. That Article, after all, states that the "State shall not make any law which takes away or abridges the [Fundamental Rights]." And any law so made is void. But is not the Supreme Court a part of the "State" (I.C. art. 12)? Is not a Supreme Court decision "law" (I.C. art. 13(3)(a))? Therefore, any court decision abridging those individual rights is arguably void and need not be obeyed by any citizen.

Such radical priority of law over order is, however, frightening to many. For this reasoning, perhaps, the "separation of powers" alternative to judicial review has been much more common among the constitutions of the world, though, again, it has apparently remained little discussed in India.[71] The simplest version of this approach would involve no review at all, neither of statutes nor of constitutional amendments. The legislature would be left to abide by the Constitution according to its own lights in

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[71] Basu, *supra* note 65. Even though Basu is an opponent of judicial lawmaking, *id.* at 252-272, and of the basic structure doctrine, *id.* 353-366, he does not appear to consider seriously the possibility that the "basic structure" doctrine could be affirmed and yet left to the legislature for enforcement. Professor Sathe, who later came to support judicial review of amendments, did once take just this position, arguing that

> the only limitation upon the power of Parliament to amend the Constitution is that such amendment cannot seek to destroy the enduring values such as liberty, justice and equality enshrined in the Constitution. This limitation is however only a rule of political morality. Its sanction lies not in the judicial process but in the vigilance of public opinion and the working of the political process.

S. P. SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION 51 (University of Bombay, 1968). A U.S. writer has likewise recently urged the unconstitutionality of amendments "incompatible" with the rest of the American Constitution, but has indicated a willingness, for democratic reasons, to leave the determination of incompatibility up to political institutions. R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?*, 742 LOYOLA 741, 763-64 (1991).

its field of action (i.e., legislation and amendments) as are the courts in their special field (i.e., fair trials and appellate processes). Great Britain and Israel are often cited as examples of this approach -- and then dismissed with the remark that their constitutions are unwritten. But there is no inherent contradiction between a written constitution and the absence of judicial review. For example, pre-1958 French regimes had written constitutions with at most very limited judicial review.[72]

The great defect of this system of "no review" has to be the fact that each branch of government is obliged to control itself. The traditional natural law maxim "No one shall be a judge in one's own case" would seem to indicate the unwisdom of such permissiveness, its possible invitation to lawlessness -- even though high courts are regularly entrusted with such self-limitation.[73]

But there are many ways that power to review statutes could be "separated" without being abolished entirely. For example, in Italy there are separate tribunals to decide the meaning of statutes and of the Constitution.[74] In France today, a quasi-political Constitutional Council is appointed to review new parliamentary legislation, while legislation once promulgated may

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[72]*See generally* Louis Henkin, *Revolutions and Constitutions*, 49 LOUISIANA LAW REVIEW 1023, 1044-56 (1989). See also *infra* note 75. The early argument against judicial review by Pennsylvania's Chief Justice John Gibson was also made in the context of a written constitution. *Eakin v. Raub* 12 Serg. and Rawle 330 (Pa. 1825). Herbert Wechsler, in his classic defense of judicial review, conceded that some constitutional questions are political, "meaning thereby that they are not to be resolved judicially, although they involve constitutional interpretation...." *Toward Neutral Principles of Constitutional Law* 73 HARVARD L. R. 1, 7 (1959).

[73]Without apparent irony, Justice Bhagwati (as he then was) in the same breath both invoked this principle and claimed judicial exemption from it: "*no authority* ... can claim that it shall be *sole judge of the extent of its power* under the Constitution. *This Court is the ultimate interpreter of the Constitution....*" *State of Rajasthan v. Union of India*, A. 1977 S.C. 1361, 1413-14, quoted in Basu, *supra* note 65, at 472 (emphasis and ellipsis as in Basu).

[74]The respective tribunals are the Supreme Court of Cassation and the Constitutional Court. For a critique of the resulting pluralism, see John Henry Merryman and Vincenzo Vigorti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. OF COMPARATIVE L. 665 (1967).

no longer be scrutinized for constitutionality;[75] executive actions are monitored by the separate and independent part of the executive branch called the Council of State. There are surely many other conceivable ways to divide up the powers that the United States and India have consolidated in a single tribunal. For example, Chile's Supreme Court can refuse to apply laws it considers unconstitutional in particular cases, but it has no *stare decisis* or equivalent power to invalidate a law *per se*.[76] The Chilean Constitutional Tribunal, on the other hand. can declare a statute entirely void, but only, as in France, before that law goes into effect.[77] No conflict between the tribunals need arise, but there can easily develop in Chilean legal culture two different binding conceptions of what the same constitutional document requires.

Such "separation of powers" approaches have the advantage of generating legal pluralism. They decentralize supreme judicial power, thus preventing the values of one entrenched body from dominating the whole legal order, without the dangers either of disorder or of tyranny. A constitution may still mean whatever its official interpreters say it means, but, because of the jurisdictional separation of these interpreters into various groups, it need not mean only one thing. Individual and community liberty -- perhaps even more important, legal thought itself -- can thus be preserved from domination by a single hierarchical superior.

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[75]Only "organic laws" are reviewed, prior to promulgation, as a matter of course; other bills must be brought to the Council prior to promulgation by specially designated plaintiffs, usually minority legislators, at least sixty being required. See Articles 56-62 of the French Constitution. Private citizens have no standing to protest the constitutionality of a law, before or after promulgation. F. L. Morton's excellent article *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMPARATIVE L. 89 (1988), concludes: "It is time that both American and European constitutional scholars conceive of *constitutional control* as the 'genus' and the American model as just one 'species' (the judicial
variation) of constitutional control." *Id.* at 110.

[76]Political Constitution of the Republic of Chile (1980) art. 80.

[77]*Id.*, art. 82(2), (12). The Constitutional Tribunal was a creative invention of the rightist Pinochet regime, intended as a bulwark for the status quo against radical legislation. Article 57 even provides that a legislator who introduces a bill later declared "manifestly" unconstitutional by the Tribunal shall lose his or her seat for two years. The same penalty is imposed upon a parliamentary leader who permitted the bill to be voted upon.

In terms of the "law vs. order" dilemma mentioned above, each constitutional solution may be categorized as follows: if there is one final authoritative interpreter of constitutional materials, as in India today, then order ultimately has priority over law for everyone except that interpreter. If each citizen may resist the highest court's flagrantly unconstitutional edicts, as in Germany, then law finally trumps order. If multiple final interpreters exist, then most of us just follow orders, as in the first approach, but the multiplicity of leaders is a safeguard against one-dimensionality in the vision of each. In this last scenario, in order for any one institution to achieve dominance, it must persuade, not just command, its fellow law interpreters.

Reinterpreting Nepal's Constitution to Eliminate Supreme Court Authority Over Constitutional Amendments

Let us look again at the constitutional text of Article 116(1) of the Nepalese Constitution, which bars amendments intended to interfere with the spirit of the Preamble:

> A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament:
>
> Provided that this Article shall not be subject to amendment.

The fundamental question is whether or not the Supreme Court has been given the power, perhaps even the sole power, to enforce this provision.

Note first of all that Article 116 itself is entirely silent on this question. By contrast, the article declaring ordinary laws void for inconsistency with the Constitution, Article 88, indicates in the very same breath that the Supreme Court may make this determination. Indeed, the supremacy of the Constitution over ordinary legislation comes into the Nepalese Constitution only under the heading "Jurisdiction of the Supreme Court" (N.C. art.

88), and no mention is made in that section of any jurisdiction to declare bills of amendment likewise void.

Of course, one could argue that the word "law" in Article 88 includes also the bills of constitutional amendment referred to in Article 116. But this **Golak Nath**-style argument has long been discredited in Indian jurisprudence. It seems settled there that laws and constitutional amendments are different in kind. Indian jurisprudence has likewise held that the measure of constitutionality is and should be different for statutes and for constitutional amendments, whereas incorporating bills of constitutional amendment into Article 88's word "law" would seem to subject both to the same standard.

Of course, Nepal need not adhere to Indian jurisprudence in these matters, but parallel arguments that do not rely on Indian authority can easily be made. For example, Article 88 and Article 116 specify separate standards of review, i.e., "unreasonable restriction...of the fundamental rights...or on any other ground" and frustration of "the spirit of the Preamble" respectively. To review bills of constitutional amendments as Article 88 "laws" would be to impose two different and possibly contradictory standards on them.

Moreover, in Nepal, unlike in India, an amendment is to be stopped while still in the form of a "bill." Only bills "introduced pursuant to clause (1)," i.e., bills that do not violate the preambular spirit, may be voted upon by the Nepalese legislature. (Note also that the first draft of the new Constitution placed its "basic structure-cum-referendum"[78] limitations in a later clause of the text, making those requirements appear posterior to legislative approval. By contrast, the placing of the present limitation in clause (1) makes it seem a preliminary requirement.) The Supreme Court would require a most unusual substantive and procedural jurisdiction in order to be able to abort amendments still in this embryonic "bill" stage of development. The Constitutional text of Article 116 thus cannot easily be read to grant the court the power to review bills of amendment.

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[78] See text accompanying note 21, *supra*.

A far more plausible reading would be to leave that power within the Nepalese legislature itself. It is, after all, legislators alone who are ordinarily concerned with "bills," with draft legislation not yet voted upon. Nepal would seem to have enacted a constitutional limit on amendments which is thus only politically rather than judicially enforceable, a limit at the amendment level quite analogous to the limits at the statute level which are self-enforced by legislatures in nations such as Britain and Israel, and even in Nepal with regard to the judicially non-enforceable "Directive Principles and Policies" (N.C. art. 24-26).

There is, moreover, a close precedent for such an interpretation in comparative constitutional history. Norway has long had a quite similar clause in its constitution, providing that no amendment is valid if it alters "the spirit of the Constitution."[79] The prevailing interpretation of that Norwegian clause is that it is only a directive for the legislature, and is not to be used by any court as an excuse for refusing to recognize the legal validity of an amendment.[80] One should also note that this Norwegian provision was discussed at the beginning of a widely-read Indian law review article, the significance of which was acknowledged in the **Kesavananda** case.[81] It is possible that the Nepalese framers drew upon Norwegian constitutional language in the course of their drafting.

Besides the above textual arguments to the effect that limits on amendments should be left to the Nepalese legislature, there is another, founded in political theory. The Nepalese constitution was neither drafted nor ratified by the Nepalese people. No constituent assembly was elected, nor was any popular referendum held to approve the text. It was put together, rather, in negotiations among the politically most powerful groups and was

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[79]Constitution of Norway (17 May 1814), Article 112. Discussed in D. Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS 347, 379-380 (1970).

[80]*Id.*, note 10e at 380.

[81]*Id.* Conrad's article was cited in *Kesavananda*, *supra* note 5 at 2020-21, by Chandrachud, J. (in dissent).

promulgated by the king. Its felt or real legitimacy may, therefore, be uncertain,[82] especially with regard to its prohibition on further amendments. Indeed, that prohibition would seem to conflict with the first sentence of the Preamble, which states that "the source of sovereign authority...is inherent in the people." How can the sovereign people be bound by a limit to which they never consented? On the other hand, if the interpretation of the amendment power is left in the hands of the people's political representatives, the fact of non-amendment would, over time at least, be arguably a tacit ratification legitimating all unamended sections.

What of the argument that no one, not even the legislator, should judge his or her own case? Is it not important that some specialized agency be given the job of scrutinizing all bills of amendment for constitutional adequacy, an agency to some degree removed from those sponsoring and voting upon the proposed amendments? Even if such objections are persuasive,[83] there are agencies other than the Supreme Court that could assume the task of review. Perhaps, on analogy to the French body of the same name, the Nepalese Constitutional Council could, by constitutional amendment, be given this function, in addition to its present less significant duties. That body is basically a council of legislative leaders (the Prime Minister, the speaker of the House of Representatives (lower house), the chair of the National Assembly (upper house), the leader of the opposition (in the House of Representatives)), plus the Chief Justice, but it does not precisely mirror the political form of the two houses that must finally vote on all amendments.

The Nepalese Supreme Court might well go along with the Constitutional Council as the appropriate and sole agency scrutinizing bills of amendment. There is a good deal of recent Indian jurisprudence discussing whether or not judicial review is

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[82] D. Conrad has argued that only with maximum possible popular consent can constituent power legitimately be exercised. *Constituent Power, Amendment, and Basic Structure of the Constitutional: A Critical Reconsideration*, 1977-78 DELHI LAW REVIEW 1. Compare discussion *supra* note 8.

[83] In the case of the king's unreviewable discretion, these objections were obviously deemed insufficient. See discussion *supra* note 7.

a part of the basic structure. Some early cases seemed to say that it was,[84] but recent opinions have clarified that constitutionality depends upon the form of fair and independent deliberations, not upon the location of the reviewing body within the judicial hierarchy.[85] The Nepalese Constitutional Council, if operating under clearly fair procedures, might well be able to meet such a test.[86]

Conclusion

Under urgent political pressure, Nepal has adopted a Constitution giving extraordinary counter-majoritarian powers to its Supreme Court, the greatest of which may be the power to prevent constitutional amendments which violate the "spirit of the Preamble." Indian constitutional theory and history, which exert a strong influence on Nepal, confirm that this court may well emerge as a leading or dominant political actor in Nepal. If the Nepalese people do not in fact desire such a result, there exists a legal alternative. The text of the Constitution of 1990 can be interpreted to permit the legislature, or a related political body, to become the appointed defender of the Constitution against inappropriate alteration.

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[84]E.g., Minerva Mills, *supra* note 35, at 1811 (Chandrachud, C. J.) and at 1826 (Bhagwati, J.).

[85]E.g., *S. P. Sampath Kumar v. Union of India*, A.I.R. 1987 S.C. 386.

[86]But if the Council appeared to become a "judicial institution," the Supreme Court might seek to claim authority over it under Article 86(1) of the Nepalese Constitution. That article declares "All other courts and judicial institutions of Nepal, other than the Military Court, shall be under the Supreme Court." See also *supra* note 12, on the translation of this clause. However, a European-style "constitutional council" is usually conceived to be a legislative rather than a judicial body. ANTONIO CARLOS PEREIRA MENAUT, LECCIONES DE TEORIA CONSTITUCIONAL, (Madrid: Editoriales de Derecho Reunidas, 1987)at 249, 251ff. "The [French] *Conseil* is not a court...; the *Conseil* is part of the legislative process." Henkin, *supra* note 72 at 1047.